86-923

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

TOYOTA OF BERKELEY,
Petitioner,

VS.

AUTOMOBILE SALESMEN'S UNION,
LOCAL 1095, UNITED FOOD AND
COMMERCIAL WORKERS UNION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN R. BOBAY
(Counsel of Record)
50 Hill Crest Court
San Anselmo, CA 94960
Tel: (415) 457-0720
Counsel for Petitioner

BOWNE OF SAN FRANCISCO INC • 190 NINTH ST • S F CA 94103 • (415) 864 2300

40PP

QUESTIONS PRESENTED

(1) Does the application of the label "procedural aspects" to a labor dispute leave the question of arbitrability with the arbitrator, rather than the court, when the agreement to arbitrate expressly and unambiguously excludes the matter from arbitration?

(2) May the arbitrator alter the clear and unambiguous language of the arbitration clause to find his own jurisdiction when the parties have expressly agreed that the arbitrator is prohibited from modifying the collective bargaining agreement?

THE PARTIES

Listed below are the parties to the proceeding in the United States Court of Appeals for the Ninth Circuit whose judgment is sought to be reviewed.

Plaintiff-Appellant: Toyota of Berkeley

Defendant-Appellee: Automobile Salesmen's Union, Local 1095, United Food and Commercial Workers Union

DESIGNATION OF CORPORATE RELATIONSHIPS

Petitioner, Toyota of Berkeley, is the business name for the corporation, Southwick Group, Inc. which is a wholly-owned subsidiary of Automall, Inc.

Imported Cars of Berkeley, Inc., is an affiliate of Southwick Group, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Article

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

TOYOTA OF BERKELEY,
Petitioner,

VS.

AUTOMOBILE SALESMEN'S UNION,
LOCAL 1095, UNITED FOOD AND
COMMERCIAL WORKERS UNION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The memorandum of the court of appeals was ordered not to be published. However, that part of the memorandum affirming the district court judgment is reported at 787 F.2d 598 (9th Cir. 1986).

JURISDICTION

The memorandum of the court of appeals [App. A, infra, pp. A-1 through A-2] was filed on March 26, 1986, and the judgment was entered on the same date. The order of the court of appeals denying the petition for rehearing and rejecting the suggestion for rehearing en banc [App. D, infra, p. A-5] was filed on September 4, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1) (1966).

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 28 U.S.C. section 185(a) (1978), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Petitioner, Toyota of Berkeley,[1] and the Respondent, Automobile Salesmen's Union, Local 1095, United Food and Commercial Workers Union,[2] were parties to a collective bargaining agreement which expired on May 31, 1983.[3] Section 17 of the former agreement called for arbitration of "disputes arising from the interpretation or application of its *specific provisions*". Collective Bargaining Agreement § 17-1 [App. E, infra, p. A-6].

To bring a dispute to arbitration, the Company and Union required that the matter "shall first be reduced to writing, citing the specific provisions . . . allegedly violated, including the relief sought. To . . . insure the prompt settlement of disputes, [it was further agreed that] the *Union shall serve written demand for arbitration upon Employer within but not exceeding thirty (30) calendar days* from the date the incident giving rise to the grievance is alleged to have first occurred." Collective Bargaining Agreement § 17-5 [App. E, infra, pp. A-6 through A-7]. Ex-

---

[1] The Petitioner, Toyota of Berkeley, will be referred to hereinafter as "the Company".

[2] The Respondent, Automobile Salesmen's Union, Local 1095, United Food and Commercial Workers Union, will be referred to hereinafter as "the Union".

[3] No new agreement has been made between the Company and the Union.

pressly excluded from arbitration was "any grievance [which] was not submitted in accordance with the provisions", because, in such cases, the Company and Union agreed that the grievance "shall be dismissed." Collective Bargaining Agreement § 17-6 [App. E, infra, p. A-7]. For any extension or waiver of the requirements, the arbitration provisions imposed the condition precedent that it be done so "only upon mutual agreement in writing." Collective Bargaining Agreement § 17-6 [App. E, infra, p. A-7].

Once the grievance was brought to arbitration, the Company and the Union sharply circumscribed exactly what the arbitrator could do and agreed that he would *"have no power to add to, or subtract from, or modify any of the provisions"* of the agreement. Collective Bargaining Agreement § 17-7.2 [App. E, infra, p. A-7]. The Company and the Union further agreed that, "[i]n rendering decisions, the arbitrator shall have due regard for the rights and responsibilities of the Employer and shall so construe the Agreement so that there will be no interference with the exercise of such rights and responsibilities". Collective Bargaining Agreement § 17-7.4 [App. E, infra, p. A-7]. Finally, the Company and the Union precluded the arbitrator from deciding any question of arbitrability; it was agreed *"that the power and jurisdiction of the arbitrator shall be limited to deciding whether there has been a violation of a provision* of this Agreement." Collective Bargaining Agreement § 17-7.6 [App. E, infra, p. A-8].

On December 2, 1982, the Company laid off one of its used car salesmen. In re Automobile Salesmen's Union, Local 1095, United Food and Commercial Workers, AFL-CIO, and Toyota of Berkeley, Discharge of Floyd Johnson, (Eaton, W., Arb.) (Arbitration Opinion and Award, dated May 25, 1984) (hereinafter referred to as "Arbitration Opinion"). [App. F, infra, p. A-10]. The Union did not make a written request for arbitration until June 22, 1983, some 200 days after the layoff. Arbitration Opinion [App. F, infra, p. A-16].[4]

---

[4] The Union was apparently waiting for the outcome of an unfair labor practice charge that it filed with National Labor Relations Board over

The Union brought the matter to arbitration on February 27, 1984. Arbitration Opinion [App. F, infra, p. A-9]. At the outset, the Company challenged the jurisdiction of the arbitrator to hear the grievance on the ground that the matter was not arbitrable. Arbitration Opinion [App. F, infra, p. A-9]. Although the arbitrator made the following findings:

> The provisions of 17-5 *are clear,* and require that a matter properly referred to arbitration must be reduced to writing, must cite specific provisions of the Agreement allegedly violated, must specify the relief sought, and, most significantly, must be served upon the Employer within 30 calendar days from the date the incident giving rise to the grievance is alleged to have first occurred. *These provisions have not been met in the present dispute* . . . .

Arbitration Opinion [App. F, infra, p. A-24], the arbitrator, relying on his own notions of "equity", Arbitration Opinion [App. F, infra, pp. A-23 through A-25], declared that the matter was arbitrable. The arbitrator heard the substantive grievance and ultimately awarded reinstatement of the salesman. Arbitration Opinion [App. F, infra, p. A-27].

The Company filed a petition to vacate the award in California state court on the grounds that the matter was not arbitrable and contrary to express and unambiguous language of the former agreement and that the arbitrator did not have jurisdiction to hear the matter. The Union removed the proceedings to the United States District for the Northern District of California and cross-petitioned for confirmation. The basis for subject matter jurisdiction stood on section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. section 185(a) (1978), and jurisdiction for the removal petition was founded pursuant to 28 U.S.C. sections 1441 et seq. (1980). Ruling on the cross-petitions, the district court confirmed the award. [App. B, infra, p. A-3].

The Court of Appeals for the Ninth Circuit affirmed. [App. A, infra, pp. A-1 through A-2]. The court of appeals viewed the

---

the layoff. The Board dismissed the charge on April 6, 1983. *In re Toyota of Berkeley*, No. 32-CA-5103 (N.L.R.B., charges dismissed, Apr. 6, 1983).

threshold question of arbitrability as one of procedure. Noting the Supreme Court's decision in *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964), the court of appeals held that procedural questions "are resolved by the arbitrator." [App. A, infra, p. A-2].

By simply applying the label of procedure, the courts below ignored the parties' express and unambiguous agreement to exclude this matter from arbitration and permitted the arbitrator to determine his own jurisdiction. The court of appeals has disregarded the principle established by this Court and several circuit court of appeals. It is for the courts, not the arbitrator, to determine the question of arbitrability based on the agreement between the parties.

REASONS FOR GRANTING THE PETITION

I

THE DECISION OF THE COURT OF APPEALS TO APPLY THE LABEL OF PROCEDURE AND IN THAT MANNER LEAVE THE ARBITRATOR WITH THE EXCLUSIVE POWER TO DETERMINE THE QUESTION OF WHETHER THE PARTIES AGREED TO ARBITRATE DEFEATS THE PRINCIPLE REAFFIRMED BY AT & T THAT THE COURT MUST DETERMINE ARBITRABILITY

The overall question presented on this petition is whether the question of arbitrability can be left to the arbitrator by labelling the agreement of the parties to arbitrate as a matter of procedure. Misapprehending this Court's opinion in *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964), the court of appeals has decided this question so as to eviscerate this Court's established rule, again emphasized in *AT & T Technologies, Inc. v. Communications Workers,* ___ U.S. ___, 106 S. Ct. 1415 (1986), that the court, not the arbitrator, determines whether the parties agreed to arbitrate.

The arbitrator's authority over a dispute, indeed, the only reason for his presence, begins and ends with the agreement between the parties. This Court has consistently adhered to its

first precept that "arbitration is a matter of contract and a party cannot be required to arbitrate any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

The Company and the Union drew up their agreement to arbitrate with a very specific result to meet a precise contingency. They spelled out in clear and unambiguous terms that any dispute for which the Union did not make a written demand for arbitration within 30 days must be excluded from arbitration.

The second precept, faithfully followed by this Court, is that the court, not the arbitrator, determines the arbitrability of the dispute—the scope of the arbitrator's jurisdiction. In *AT & T*, this Court explained:

> The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be "drastically reduced," however, if a labor arbitrator had the "power to determine his own jurisdiction. . . ." Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1509 (1959). Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but instead, would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." *Ibid.*

___ U.S. at ___, 105 S. Ct. at 1419-1420.

Under the guise that a procedural question was at issue, the court of appeals ignored these principles and left the question of arbitrability exclusively with the arbitrator thereby allowing him to determine his own jurisdiction. The end result was that the arbitrator, relying on his own notions of equity and industrial justice, created his version of an agreement to arbitrate contrary to the clear and unambiguous language of what the parties had agreed to beforehand.

One commentator, in whose view an arbitration clause even less restrictive than the one presented in this petition did not

permit the arbitrator to determine his jurisdiction, stated his reasoning as follows:

> The apparent purpose is to confine the power of the arbitrator. Apparently the parties choose it because one party, usually the employer, distrusts arbitration at least to the point of insisting upon some *safeguard against the arbitrator's imposition of significant obligations not contemplated by the agreement and quite beyond its scope.* The clause does not tell what the arbitrator should not do. It tells what he cannot do.

Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509 (1959).

The decision of the court of appeals has turned on its head those pleasant sounding notions that the agreement to arbitrate was a product of negotiation and that arbitration is what the parties bargained for. The Company and the Union negotiated and expressly agreed to exclude any grievance from arbitration if written demand was not made within 30 days. Having bargained for the right to exclude such matters from arbitration, the Company did not receive the benefit of that bargain. If the purpose of arbitration is to make a speedy dispute-resolution mechanism available for both parties, then the arbitrator's modification of the arbitration agreement threw to the winds any such advantage. There could be no speedy resolution when the arbitrator permitted the Union to sit back for 7 months before demanding arbitration and a year and a half to come up with a provision of the collective bargaining agreement that it allegedly sought arbitration of.

The Company, with prudent foresight as it turned out, sought to protect itself from an onslaught of the Union's stale demands for arbitration where the presentation of a proper defense would be handicapped by the fading memories of the witnesses and by the difficulties in digging up documentary evidence and by alleged oral agreements—evidence difficult to prove or disprove and which invite controversy.

By allowing the arbitrator to determine the question of arbitrability, the court of appeals has rendered empty the promise that

a party can protect itself from the hazards of arbitration resulting from incompetent and unfair awards by negotiating for their exclusion. What good does it do the party to negotiate for the outright exclusion of a matter from arbitration when the arbitrator can disregard the express and unambiguous language of the agreement to arbitrate and find his own jurisdiction to hear the grievance?

II

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE RULE OF SEVERAL OF THE OTHER CIRCUITS THAT THE COURT DETERMINES ARBITRABILITY IRRESPECTIVE OF WHETHER IT IS LABELLED PROCEDURAL OR SUBSTANTIVE

The decision of the court below to label the parties' agreement a matter of procedure which must be left to the arbitrator is in conflict with a contrary rule adopted by at least two of the other circuits.[5] The Third Circuit, in *Philadephia Printing Pressman's Union No. 16 v. International Paper Co.*, 648 F.2d 900 (3rd Cir. 1981), held that the label of procedure "begs the question of whether, indeed, the parties here are obligated to submit the Axilrod matter to arbitration" and that the issue of arbitrability, even if it arose out of the grievance provisions, remains with the court. 648 F.2d at 903. The circuit court, refusing to allow an arbitration hearing to enlarge the agreement to arbitrate, explained that "the national policy of encouraging settlement of labor disputes by arbitration would be ill served if it were used to justify unilateral abridgement of express grievance provisions of collective bargaining agreements." 648 F.2d at 904.

---

[5] The Fifth Circuit has followed the Ninth Circuit and refused to determine the arbitrability of a dispute on the ground that it was a matter of procedure. *Local 406, AFL-CIO v. Austin Co.*, 784 F.2d 1262 (5th Cir. 1986). The Seventh Circuit has apparently adopted the rule urged in this petition. See *Sunbeam Appliance Co. v. IAMA District 8*, 511 F. Supp. 505 (N.D. Ill. 1981), *aff'd mem.*, 679 F.2d 893 (7th Cir. 1983), (vacated the arbitrator's finding of arbitrability because the award ignored the express terms in the agreement to arbitrate requiring the union to invoke arbitration within 10 days).

The Sixth Circuit in *Detroit Coil Co. v. IAMA Lodge 82,* 594 F.2d 575 (6th Cir.), *cert. denied,* 440 U.S. 840 (1979), vacated an arbitration award where the arbitrator found arbitrability based on the claim that the parties had waived written notice as required by the arbitration clause of the collective bargaining agreement. The circuit court wrote:

> In view of the clear and unambiguous language of Article V [the arbitration clause] of the collective bargaining agreement, and since the record contains no evidence indicating a departure by the parties from the clear intendment of that language, we conclude that the arbitrator's award cannot be deduced rationally from the Agreement, nor does the award draw its essence from the Agreement.

594 F.2d at 581.

The decisions of the Third Circuit and the Sixth Circuit further the principles in *AT & T* that have served labor and management so well over the years. The decision of the court of appeals below, on the other hand, ignores the express terms of the parties' agreement to arbitrate and creates its own exception to the rule that the court must decide arbitrability.

As support for its exception, the court of appeals relies on what it views as a "suggestion" in this Court's opinion in *Wiley,* that "procedural questions should be left to the arbitrator". *Retail Delivery Drivers Local 588 v. Servomation Corp.,* 717 F.2d 475, 478 & 477 (9th Cir. 1983); [App. A, infra, p. A-2]. But, by focusing solely on this so-called "suggestion", the court of appeals blinded itself to the true meaning of *Wiley.* The Supreme Court repeatedly emphasized that "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." 376 U.S. at 547.

Wiley did not intend for the court's duty in determining the threshold question of arbitrability to turn on labels of procedural issues versus substantive issues. *AT & T* did not address the question of arbitrability in such terms either. Historically, the attempts of jurists to distinguish procedural matters from substantive ones, have never withstood any sort of credible or erudite

analysis. Indeed, *Wiley* cautioned the courts from embroiling themselves in a sophistic debate over the application of such terms. The Supreme Court wrote: "We think that labor disputes of the kind involved here cannot be broken down so easily into their 'substantive' and 'procedural' aspects." 376 U.S. at 556.

The court of appeals' treatment of the arbitrability issue thrusts the courts back into the game of labels that *Wiley* sought to avoid. It conflicts with the doctrine of this Court and other circuits as well. It has created an unwarranted exception to the rule that it is for the court, not the arbitrator, to determine whether the parties had agreed to arbitrate. All of which are important reasons for granting the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. BOBAY
(Counsel of Record)
50 Hill Crest Court
San Anselmo, CA 94960
Tel: (415) 457-0720
Counsel for Petitioner

December 3, 1986

(Appendices follow)

Appendix A

Not For Publication

United States Court of Appeals

For the Ninth Circuit

No. 85-1947

D.C. No.
C-84-6305-JPV

Toyota of Berkeley, a corporation,
Plaintiff-Appellant,

vs.

Automobile Salesmen's Union, Local 1095,
United Food and Commercial Workers Union,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California

John P. Vukasin, U.S. District Judge, Presiding

Argued and Submitted: March 11, 1986
San Francisco, California

Memorandum*
[Filed March 26, 1986]

Before: WALLACE, KENNEDY, and FARRIS, Circuit Judges.

There is no question that the parties have agreed to submit the subject matter of this dispute—whether Toyota of Berkeley (Toyota) acted within its rights in discharging salesman Floyd Johnson—to arbitration. However, Toyota claims that the arbitrator exceeded his authority under the collective bargaining agreement when he heard the grievance despite the Union's failure to serve a written demand for arbitration upon Toyota within the thirty-day period provided by section 17-5 of the contract.

---

* This disposition is not intended for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

It is well settled that once the parties have agreed to submit the subject matter of a dispute to arbitration, procedural questions, including compliance with preliminary steps in a contractually mandated grievance procedure, are resolved by the arbitrator. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964); *Sheet Metal Workers International Association Local Union No. 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 744-45 (9th Cir. 1985); *Retail Delivery Drivers Local 588 v. Servomation Corp.*, 717 F.2d 475, 477-78 (9th Cir. 1983). Determining compliance with the grievance procedure is within the scope of the arbitrator's authority under the collective bargaining agreement to determine violations of the contract. In considering whether the time limit was violated in this case, the arbitrator did not act improperly in finding that the conduct of Toyota amounted to a waiver of, or estopped it from demanding, literal compliance with the contractual time limit. *See Servomation*, 717 F.2d at 478 (ordering arbitration where petition alleged Servomation had waived any right to assert a time bar). Toyota's attempt to distinguish *Servomation* on the ground that the arbitration clause in *Servomation* was unclear is without merit; the clause in *Servomation* clearly required notice of desire to arbitrate within seventy-two hours of notification of the Adjustment Committee's inability to decide the matter. *Id.* at 476 & n.1.

Toyota's claim that California law governs this case is also meritless. Rights and claims under a collective bargaining agreement present questions of federal law. *See Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980) (per curiam) (federal labor law supercedes state law theories).

The order of the district court confirming the arbitration award is AFFIRMED.

Appendix B

In the United States District Court
for the Northern District of California

C-84-6305 JPV

Toyota of Berkeley,
Petitioner and Cross-Respondent,

vs.

Automobile Salesmen's Union, Local 1095,
United Food and Commercial Workers, AFL-CIO,
Respondent and Cross-Petitioner.

ORDER CONFIRMING
ARBITRATION AWARD

[Filed Dec. 31, 1984]

The petition of Toyota of Berkeley to vacate the arbitration award of William Eaton and the cross-petition of Automobile Salesmen's Union Local No. 1095 to confirm the arbitration award of William Eaton came on for hearing on November 8, 1984. Good cause appearing,

IT IS HEREBY ORDERED that the petition of Toyota of Berkeley is dismissed and the cross-petition of Automobile Salesmen's Union Local No. 1095 is granted. The arbitration award of William Eaton dated May 25, 1984 is confirmed and made an order of this Court and Toyota of Berkeley is commanded to comply therewith.

DATED: Dec 31, 1984

J.P. VUKASIN, JR.
United States District Judge

Appendix C

In the United States District Court
for the Northern District of California

C-84-6305 JPV

Toyota of Berkeley, a corporation,
Petitioner & Cross-Respondent,

vs.

Automobile Salesmen's Union, Local 1095,
United Food and Commercial Workers Union,
Respondent & Cross-Petitioner.

ORDER DENYING MOTION FOR REHEARING AND AMENDED ORDER AND FOR ADDITIONAL AND AMENDED FINDINGS

[Filed March 26, 1985]

The above-styled cause having came on regularly for hearing on February 14, 1984, upon argument of counsel for the parties upon the Rule 52 and Rule 59 motions of Petitioner and Cross-Respondent Toyota of Berkeley, having fully considered said motions and the Court being advised in the premises,

ACCORDINGLY, IT IS HEREBY ORDERED, that the motions are denied and because of the clerical error in this Court's previous Order Denying Motion for Rehearing and/or Reconsideration (entered March 14, 1985), the same is hereby vacated.

DATED: Mar 26, 1985.

J.P. VUKASIN, JR.
United States District Judge

Appendix D

United States Court of Appeals

for the Ninth Circuit

No. 85-1947

D.C. No.
C-84-6305-JPV

Toyota of Berkeley, a corporation,
Plaintiff-Appellant,

vs.

Automobile Salesmen's Union, Local 1095,
United Food and Commercial Workers Union,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California

ORDER

[Filed Sept. 4, 1986]

Before: WALLACE, KENNEDY, and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Appendix E

SECTION 17. BOARD OF ADJUSTMENT:

(17-1) The Employer and the Union agree to meet and deal with each other or through their duly authorized representatives on the adjustment of disputes arising from the interpretation or application of the specific provisions of this Agreement.

(17-2) Grievances or disputes arising from the interpretation or application of the provisions of this Agreement must be submitted in writing to the Employer by the grievant within seven (7) days from the date the incident giving rise to the grievance is alleged to have first occurred. Grievances not adjusted satisfactorily between the employee and his supervisor or their respective representatives shall be referred to a grievance committee for settlement as hereinafter provided. Grievances or disputes going before the grievance committee must be in writing citing the specific provision of this Agreement allegedly violated and the relief sought. To be timely, the grievance must be referred to the grievance committee within seven (7) days after the Employer's denial of the grievance. In the event the grievance committee is unable to resolve the matter, the grievance shall then be referred to an impartial arbitrator for final and binding settlement.

(17-3) The grievance committee shall be composed of two (2) representatives chosen by the Employer, and two (2) representatives chosen by the Union.

(17-4) It is agreed that all decisions rendered by the impartial arbitrator or a majority of the grievance committee shall be final and binding upon the parties signatory hereto. The expenses incident to arbitration shall be borne one-half by the Employer and one-half by the Union. All discharge cases in dispute must be appealed in writing within three (3) workdays, Monday through Friday, of the date of discharge.

(17-5) The parties agree that matters properly to be referred to arbitration shall first be reduced to writing, citing the specific provisions of this Agreement allegedly violated, or for which interpretation is desired, including the relief sought. To be timely and insure prompt settlement of disputes, the Union shall serve

written demand for arbitration upon Employer within but not exceeding thirty (30) calendar days from the date the incident giving rise to the grievance is alleged to have first occurred.

(17-6) It is agreed that any grievance not submitted in accordance with the provisions of this Article shall be deemed untimely and shall be dismissed. The time limits herein provided may be extended only upon mutual agreement in writing.

(17-7) In the event the parties signatory hereto fail to mutually agree upon an impartial arbitrator, the arbitrator shall be selected by respondent from a panel of not more than seven (7) arbitrators to be furnished by the State or Federal Mediation and Conciliation Service. Such arbitrator shall be empowered, except as his powers are limited below or by the submission agreement as follows:

(17-7.1) He shall have no power to add to, or subtract from, or modify any of the provisions of this or supplemental agreements if any;

(17-7.2) He shall have no power to establish wage scales or change any existing wage rate in this Agreement;

(17-7.3) He shall have no power to substitute his discretion for that of the Employer or the Union where either party has retained discretion or is given discretion by the expressed terms of this Agreement or by any supplementary written agreements, except that where he finds a disciplinary layoff or discharge results from a manifestly arbitrary exercise of the Employer's judgment in fixing the extent of the penalty, he may make appropriate modifications of the penalty;

(17-7.4) He shall have no power to decide any question which, under this Agreement is within the right of the Employer or the Union to decide. In rendering decisions, the arbitrator shall have due regard for the rights and responsibilities of the Employer and shall so construe the Agreement so that there will be no interference with the exercise of such rights and responsibilities, except as those rights are expressly conditioned or limited by the terms of this Agreement;

(17-7.5) Employer liability for any claim for back wages shall be limited to the amount of wages the employee would have been entitled as outlined in Section 6-3 of the Agreement, less any unemployment compensation entitlement or other compensation for personal services received from any source during the period involved in the dispute;

(17-7.6) The parties agree that the power and jurisdiction of the arbitrator shall be limited to deciding whether there has been a violation of a provision of this Agreement.

Appendix F

Arbitration Opinion and Award Pursuant to Section 17 of the Agreement Between the Parties

Automobile Salesman's Union, Local No. 1095,
United Food & Commercial Workers, AFL-CIO,

and

Toyota of Berkeley,
Discharge of Floyd Johnson.

WILLIAM EATON
Arbitrator

Appearances:

For the Union:
DAVID ROSENFELD, Esq.
Van Bourg, Allen, Weinberg & Roger
875 Battery Street
San Francisco, CA 94111

For the Company:
MARK JORDAN, Esq.
Redwood Employers Association
P.O. Box 1862
Santa Rosa, CA 95403

ISSUES AND EVIDENCE

The dispute involves the discharge of Used Car Salesman Floyd Johnson. Formulation of the issue was left to the Arbitrator, the parties having submitted somewhat different versions at the arbitration hearing. Accordingly, the issue to be determined is whether the Grievant was discharged in violation of the Agreement between the parties, and if so, what the remedy shall be. The employer raises the threshold issue as to whether the matter is timely and arbitrable.

Hearing was held in Emeryville, California on February 27 1984. At that time the Grievant was fully and fairly represented by counsel for the Union, was present throughout the hearing, and

testified in his own behalf. Following presentation of additional testamentary and documentary evidence, the parties elected to submit the case upon simultaneous filing of written briefs, which was completed on May 9 1984.

The Grievant was hired by the Company as a used car salesman on approximately August 25 1982, and was discharged on December 2 1982. According to Mike Levy, who was used car manager for the Company at the time, the Grievant was discharged for lack of sales effectiveness. Company President Tim Southwick indicated the discharge was for failure to follow Company procedures designed to promote sales effectiveness. The Company alleges that the Union completely ignored the time requirements of the Agreement, and that the matter therefore is not now arbitrable.

The Union contends that it experienced difficulty and delay procuring necessary materials from management by which to process the grievance, and that in the course of processing the grievance it became apparent that lack of productivity was not the reason for the Grievant's discharge. The Union maintains that the manner in which the grievance was processed complies with practice between the parties, and that the Company has failed to show that the Grievant was nonproductive compared to other salesmen.

Grievant's Termination

Used Car Manager Levy, who terminated the Grievant, was hired by the Company as used car manager (following a previous term in the same job) in September of 1982, a few weeks after the Grievant was hired. Levy testified as to sales procedures which the Grievant allegedly failed to follow.

The first document the salesman is required to handle is known as an UPS card, which is to be filled out for anyone who walks through the door of the salesroom. The idea is to generate a written record of everyone talked to, whatever the outcome of the contact. According to Levy, at some time during a discussion with a potential customer the salesman to required to excuse himself briefly, to take the "UPS" card to the sales manager, and to

consult with him as to the best way to proceed in the hope of effecting a sale.

The salesman is also required to fill out a card summarizing his daily floor activity for the prior day. This is given to the manager for critique and targeting of future goals. Finally, the sales manager's daily control sheet is filled out by the sales manager, and is also designed to record independently of the salesmen's reports the names of everyone who comes through the door.

These materials record the customer's name, the car looked at, the salesman's name, an appraisal of the potential customer's used car, if appropriate, and similar information. Asked whether all salesmen follow the program religiously, Levy replied, "Of course not." He estimated that these materials are normally retained for approximately a month, and then destroyed.

Levy testified that, in his observation, the Grievant had far more customer contacts than were recorded on his cards. In addition, Levy maintained that the Grievant frequently failed to contact him prior to leaving the showroom, as he was required to do. Asked how the Grievant's sales performance compared with other salesmen at the time, Levy replied that, as of the arbitration hearing date, he had "no idea", but that he would have had that information at the time the Grievant was terminated.

Levy testified that he had two conversations with the Grievant concerning these deficiencies prior to the date he was terminated. First of these was on November 15, 1982 in Levy's office. Levy stated that he informed the Grievant at that time that his efficiency and productivity were not acceptable, and asked him if he understood the Company's program, to which the Grievant replied in the affirmative. At that time, according to Levy, the Grievant agreed that his performance was not up to his own standards either, and that he would "get with" the program.

Thereafter, Levy stated, the Grievant's performance did improve for a time, but his "ineffectiveness magnified" so that is was necessary to speak to him again on November 23. Levy related a conversation similar to that the two had had on November 15. The Grievant agreed that he was not satisfied with his performance, and that he would try to improve. However, following this

second conversation, Levy testified that he found no improvement in the Grievant's performance. Levy recalled that he may have indicated to the Grievant that sale of some eight to eleven cars per month would be satisfactory, but agreed that the Company had no standard at the time, nor could he recall whether other salesmen made that number of sales. Asked again whether others followed the procedure as outlined above, Levy replied that, "There are different levels of cooperation."

During a third meeting between the Grievant and himself, which was held on December 2, 1982, Levy informed the Grievant that he was terminated. The reason given, as Levy recalled, was that the Company "couldn't afford him" in terms of sales not made. Questioned as to whether he told the Grievant that he was terminated or laid off, Levy replied that he was "confused about the difference" between the two, but that, to him, it was largely a matter of "personal self esteem." Levy added that, in either case, "When you're gone, you're gone."

Company President Southwick testified that he had become aware that the Grievant was not following the required tracking system sometime during his first thirty days of employment. Southwick characterized the Grievant as "generally in the group" of one or two who failed to follow the system rigorously. According to Southwick, failure to follow the system was the only reason for the Grievant's termination.

The Grievant's version of these events was in sharp contrast to that of Levy. Levy's predecessor, the Grievant stated, had not required following the tracking forms. He agreed, however, that Levy had informed him that the forms were to be filled out in the future, but maintained that Levy had never discussed the matter formally with him, or had a follow-up discussion on November 15 and November 23 as testified to by Levy. The Grievant stated that when Levy was hired, he had thought that Levy might want his own crew of salesmen, and had offered to resign at that time, but that Levy had declined to accept his resignation.

The Grievant testified that, after being informed that the forms were to be used, he did utilize them to the best of his ability for every customer who came in thereafter, and that he turned them

in to Levy as required. Although he agreed that productivity had been discussed at weekly sales meetings, the Grievant maintained that Levy had never told him personally that his production was inadequate. He also contended that Levy had never told him to bring the "UPS" card to him while the customer was still there, and that, as a result, the Grievant had not done so, nor had anyone else in the used car sales department.

One of the production requirements announced at the weekly sales meetings was the requirement that each salesman make his "draw" by the middle of the month, or his employment with the Company would be "history." the draw referred to is in the amount of $800 per month, which is paid in advance by the Company against future sales. The Grievant testified without contradiction that he made his draw before November 15 for the month of November.

It was at the meeting of December 2, as the Grievant recalled, that Levy first spoke of his alleged "lack of production." The Grievant agreed that he was not entirely satisfied with his November production, even though he had made his draw. He testified that at the meeting of December 2, he protested to Levy that he was being let go when he had made his draw, even though two other salesmen were being retained who, he stated, had not made theirs. The Grievant stated that no mention was made to him by Levy of any failure to follow the tracking system at the December 2 meeting when he was advised of his termination.

A series of salesman's compensation reports, showing the monthly compensation for the Grievant and other salesmen at the Company for the months of October and November, was introduced into evidence. In brief, these reports indicate that the Grievant's compensation fell somewhere in the middle, some salesmen earning more, some earning less. Testimony is that some of those earning less are still employed by the Company. Company President Southwick testified that, in his opinion, gross compensation is not a "very valid" way to judge a salesperson's worth, or to determine whether he is following the Company's policies and procedures. The reports, for example, do not show the number of days a salesman might have worked, which of

them might have been new and inexperienced hires, or such information as the ratio of customer contact to sales.

Union Activities

The present Agreement between the parties became effective on October 1, 1982. While the Grievant had apparently been a member of the Union prior to that time, arrangements were subsequently made for others to leave work in shifts in order to sign up with the Union. According to the Grievant, there was some dissention among the sales people about joining to which he suggested that, since the Company had signed, "Why should we fight it?"

Levy testified that he discussed the new Union Contract with Company President Southwick on only one occasion, briefly, the day before it was to become effective. He then recalled that the Contract might have been mentioned in a passing discussion with one or two other Company officials, and that the upshot was simply that the Company had a Contract, and would abide by it. Levy understood that its terms would not impinge upon the effectiveness of the sales manager, according to his testimony.

After the effective date, Levy apparently had occasion to help arrange the sign-up, and testified to "some confusion" in that regard. He could not recall any discussion about whether the Company would pay Union dues for any of the salespeople, although Company records indicate that there may have been authorization for dues withholding on the part of some of them. The Company denies that any Union dues were paid as a "spiff", that is, an incentive or bonus type payment.

Union Secretary-Treasurer Richard Salvaressa testified that at a February board of adjustment meeting concerning this dispute, production was the only reason discussed for having terminated the grievant. According to Salvaressa, when he asked the Company why the Grievant had been terminated when he had outsold others who had remained with the Company, there was no answer. It appears that at least one other salesperson was discharged by Levy, for misconduct, tardiness, and perhaps other offenses, although Levy had stated to the National Labor Rela-

tions Board in a related action that no one except the Grievant had been discharged during the time frame in question.

Timeliness

The Union notified the Company by letter of December 3, 1982 that it was filing a formal grievance "for the terminations of Employees for Union Activity", and requested certain pay records as well as a meeting on the matter on December 10, 1982. By letter of December 8, 1982, the Company's representative requested that the Union furnish the names of the individuals allegedly terminated for Union activity, and other facts upon which the grievance was based.

A further conversation was had on December 10, 1982, at which the Union apparently again requested monthly payroll records for each individuals salesman for the preceding twelve months. By letter of December 17, 1982, the Union advised the Company that it had not been able to obtain the records, and that it again requested commission statements and vouchers for each retail and lease transaction, as well as other information.

Secretary-Treasurer Salvaressa testified that he had experienced difficulty in subsequently arranging the "two-and-two" grievance committee meeting provided for in Section 17-3 of the Agreement. It was his testimony that the letter of December 3, 1982 was his first attempt to arrange that meeting, but that it did not finally occur until approximately February 7, 1983.

Union Attorney David Rosenfeld testified that between February and June of 1983 he had several conversations with Andy Kilass, the Company's representative, in which he asked that the present dispute be taken directly to arbitration. On April 25, 1983 Mr. Kilass wrote to Mr. Rosenfeld indicating that the employer "does not desire to waive any of the procedural steps or requirements of the current agreement", and asked therefore that the Union advise as to its "availability to proceed towards the appropriate resolution." Subsequently the Company informed the Union of its belief that the matter was not arbitrable for the reason that no written demand for arbitration had been presented.

Accordingly, by letter of June 22, 1983, Mr. Rosenfeld advised Mr. Kilass of the Union's belief that it was the Company's insistence "that the procedural steps be followed" in the case which had caused "substantial delay." The letter stated that the Company had always been on notice that the Union intended to proceed to arbitration with the present dispute as well as several others listed therein.

Rosenfeld agreed that, to his knowledge, no written request for arbitration had been presented prior to the June 22 1983 letter, but maintained that at the "two-and-two" grievance meeting the Union had told the Company that it was going to arbitration on this and the other disputes. Discussions between the parties continued thereafter on that basis, according to the testimony of Rosenfeld.

Correspondence was introducted into evidence by the Union indicating similar discussions and delays between the parties concerning other grievances.

Contract Provisions

SECTION 4

DISCHARGE OF AND DISCRIMINATION AGAINST EMPLOYEES

(4-1) No employee shall be discharged or discriminated against because of union activities or upholding Union principles.

. . .

(4-3) Except as provided in this Agreement, Union recognizes the right of the Employer to employ, retain in employment, discharge, or replace employees for the efficient operation of his business.

(4-4) The Employer will notify the Union in writing within twenty-four (24) hours of any quits or terminations of an employee, and the Union shall have seventy-two (72) hours upon receipt of notice of termination or quits (Sundays and holidays excepted) to meet with the Employer to discuss the termination or quits.

SECTION 17

BOARD OF ADJUSTMENT

(17-2) Grievances or disputes arising from the interpretation of application of the provisions of this Agreement must be submitted in writing to the Employer by the grievant within seven (7) days from the date the incident giving rise to the grievance is alleged to have first occurred. . . . To be timely, the grievance must be referred to the grievance committee within seven (7) days after the Employer's denial of the grievance. In the event the grievance committee is unable to resolve the matter, the grievance shall then be referred to an impartial arbitrator for final and binding settlement.

(17-4) . . . All discharge cases in dispute must be appealed in writing within three (3) workdays, Monday through Friday, of the date of discharge.

(17-5) The parties agree that matters properly to be referred to arbitration shall first be reduced to writing, citing the specific provisions of this Agreement allegedly violated, or for which interpretation is desired, including the relief sought. To be timely and insure prompt settlement of disputes, the Union shall serve written demand for arbitration upon Employer within but not exceeding thirty (30) calendar days from the date the incident giving rise to the grievance is alleged to have first occurred.

(17-6) It is agreed that any grievance not submitted in accordance with the provisions of this Article shall be deemed untimely and shall be dismissed. The time limits herein provided may be extended only upon mutual agreement in writing.

(17-7.3) [The arbitrator] shall have no power to substitute his discretion for that of the Employer or the Union where either party has retained discretion or is given discretion by the expressed terms of this Agreement or by any supplementary written agreements, except that where he finds a disciplinary layoff or discharge results from a manifestly arbitrary exercise of the Employer's judgment in fixing the extent of the penalty, he may make appropriate modifications of the penalty;

(17-7.5) Employer liability for any claim for back wages shall be limited to the amount of wages the employee would have been entitled as outlined in Section 6-3 of the Agreement, less any unemployment compensation entitlemenmt or other compensation for personal services received from any source during the period involved in the dispute.

DISCUSSION

Employer Argument

In determining this case, the Employer suggests that the first issue is whether or not the matter is timely and arbitrable, and that the second issue, concerning the substantive matter of the Grievant's discharge, is whether or not the Employer violated Section 4-1 of the Agreement in the discharge. The Union suggests a broader issue, to be phrased, "Was the discharge of Floyd Johnson in violation of the collective bargaining Agreement between the parties, and if so, what shall the remedy be?" It appears that the Union is not questioning the existence of the timeliness issue, and has presented evidence in its defense. Procedurally it would be appropriate that the Arbitrator rule on the timeliness issue first.

It is essential that the Arbitrator be made aware of the very specific time requirements of the Agreement. Section 17-5 specifically states that, "To be timely . . . the Union shall serve written demand for arbitration upon Employer within but not exceeding thirty (30) calendar days from the date the incident giving rise to the grievance is alleged to have first occurred." Section 17-6 provides further that, "It is agreed that any grievance not submitted in accordance with the provisions of this Article shall be deemed untimely and shall be dismissed." The same section also provides that the time limits may be extended only upon "mutual agreement in writing." Those are the applicable collective bargaining Agreement provisions, and they must be strictly followed.

The Union presented a number of exhibits in an effort to show that this Employer has a "track record" of not promptly processing grievances. The Union has candidly admitted that these

exhibits are in no way connected with the instant case. Hence they are irrelevant and are of not probative value.

It should be pointed out that the Employer did request from the Union that the specific provisions of the Contract which were violated be put down in writing, as well as the relief sought by the Grievant. This request was promptly made by the Employer. On December 3, the Union advised the Employer that there was a "formal grievance." By letter dated five days later, the Employer requested to be provided more explicit information, in accordance with Section 17-5. There is no evidence that the Employer acted in a dilatory manner or waived its right to assert the timeliness issue before the Arbitrator.

The Union attempted to bypass its own grievance-arbitration procedure and process this employee's discharge through the National labor Relations Board. It was not until it became apparent that the NLRB was not going to issue a complaint that the Union pressed the grievance procedure. Such an election of remedies is not a sufficient excuse, particularly in light of the specific time requirements set forth in the Agreement. The requirements of Section 17-6 is that any grievance not submitted in accordance with the provisions of this Article "shall" be deemed untimely filed and "shall" be dismissed. The Arbitrator has little choice. In order to find this arbitration timely, the Arbitrator must find that the Employer has waived its rights to raise the time limits. There are no facts supporting such a waiver.

This is not an instance of an employee being unaware of the existence of the grievance procedure. The Employer notified the Union on the day of the Grievant's discharge. Speaking on the issue of waiver in timeliness questions, Arbitrator Rader, in *Firestone Tire and Rubber Co.*, 9 LA 518, stated that the parties to a contract can waive provisions by implication only if the implications are of such a nature to create a legal and positive presumption that the same were waived. Otherwise it is necessary that there be a direct waivering by both parties to any given provision in a contract.

The Union has presented no evidence that the Employer has waived any of the specific time requirements in the collective

bargaining Agreement. Abritrator Lewis M. Gill, in *Landcaster Malleable Casting Company,* AAA Case No. 9-10, stated that the parties can waive a contractual provision by mutual agreement, but an arbitrator cannot. Further, the reasons why time limits should be adhered to were discussed by Arbitrator Stouffer in *Precision Extrusions, Inc.,* 49 LA 338, wherein he states, "Any relaxation of the time requirement, rather than benefiting any of the parties, actually leads to the ultimate destruction of the utility of the grievance procedure." (See also *John Deere Tractor Co.,* 3 LA 737, and *Joy Manufacturing Co.,* 44 LA 304, with regard to the benefits of timeliness of grievances.)

The facts are undisputed that the Union did not give a written request for arbitration within 30 days of the incident having occurred. There has been no waiver by the Employer. The Arbitrator has no alternative but to dismiss the grievance as being untimely, which will have no harsh results inasmuch as the Grievant has already had his "day in court" with the NLRB.

The distinction between the Union's suggested issue and that of the Employer arising from the discharge of the Grievant is basically whether or not the Contract requires "just cause" in terminating an employee. The Employer asserts that the specific language of Section 4-3 allows it vast discretion in discharging employees for the "efficient operation of his business."

It should be noted that in the Union's initial grievance letter to the Employer the Union asserted that the termination was "for Union activity." It is quite obvious that, from the outset, the Union recognized that the Employer was not required to show "just cause", but rather than the burden was on the Union to show Union activity.

While it is correct that findings of the NLRB are not binding on arbitration, the fact is that in this case the Board refused to issue a complaint. The Contract requires the Union to prove the Grievant was discharged for Union activity in Section 4-1. The Union has presented absolutely no evidence that the Grievant was discharged for Union activity. Mike Levy, his immediate supervisor, testified that he had no knowledge of Union activities with the exception of cooperating with the Union in scheduling off-

premises Union meetings—on Company time—to accommodate the Union in enforcing the Union security provisions of the Contract. There is no showing of Union activity, and the Union has failed to carry its burden to show that the Grievant was terminated for that reason.

The testimony of Mr. Levy established that the Grievant was not an efficient employee. He, Mr. Southwick, and the Union Business Representative Rich Salvaressa all agreed that one measurement of an employee's efficiency is the number of sales made in relationship to the number of people contacted. In this area the Grievant was clearly deficient, in addition to the fact that he initially refused to follow the established sales tracking procedure required by the Company.

It is also noted that in the industry a new sales manager often brings in his "own crew." The Grievant was terminated by Mr. Levy within 60 days of Levy becoming the used car manager. This termination was based on the Grievant's inability to function efficiently in the sales program established by the Employer. The peculiarities of the auto industry are reflected in the collective bargaining Agreement which not only does *not* require "just cause" for termination, but specifically gives the Employer leeway in discharging employees who are inefficient.

The Union has not met its burden to show that the Grievant was discharged for Union activities, while the Employer has presented credible evidence that his discharge was motivated solely by his inefficiency.

For reasons stated above, there should be no remedy granted, and the grievance should be dismissed for being untimely and/or without merit. The processing of this grievance to arbitration is a blatant example of the Union's attempt to get not due process, but dual process. Having failed on the merits with the NLRB, the Union then untimely attempted to litigate the merits before the Arbitrator. The Union has once again failed to meet its burden.

Union Argument

The Employer asserts that since the December 3, 1982 letter refers only to "Union Activity", the Union is foreclosed from

presenting evidence that there was no cause for the discharge. In response to this, the Union asserts that first, the grievance letter requests payroll records, putting the Employer on notice that the question of production was an issue; second, that the Employer responded on December 8, 1982 seeking further specifics with regard to the grievance, and that information was given to the Company at the Board of Adjustment hearing because the parties discussed "lack of productivity" at that time; third, the procedural defenses were not initially asserted when efforts were made to set this matter for arbitration; and finally, that there is no prejudice to the Employer since he was well aware that "productivity" was an issue with respect to the discharge of the Grievant.

With regard to the timeliness of the Union's request for arbitration of this matter, Section 17-2 of the Contract mandates that any grievance which is unresolved by the grievance committee "shall the be referred to an impartial arbitrator for final and binding settlement." This mandatory language may be interpreted to require arbitration of disputes which were unresolved without reference to the timeliness constraints mentioned in Section 17-5. In this case, the Union made attempts to set up the grievance committee with the Employer, but he was not available under February 7. Thus, any demand for arbitration prior to the Board of Adjustment would have been premature.

Most importantly, the Employer is estopped from asserting any bar to arbitration because of the Union's failure to request arbitration in writing within 30 days since, at the very same time, another grievance was being processed with respect to Union security. When the Union demanded arbitration on December 3, 1982, in that grievance, the Employer responded by stating that the "request for arbitration is premature." Thus, the Employer was taking the decidedly opposite position that any request for arbitration prior to the Board of Adjustment would be premature. In fact, the Employer was also taking the position that any request for arbitration was premature until the parties had "concluded the first step."

The Employer has consistently stalled in response to the Union's requests to pursue grievances by requesting further information, or stating that any initial request for arbitration is prema-

ture. We submit that the Employer's procedural defenses are not raised out of any equitable position, but that the Employer was not interested in this case, or any other case, proceeding to arbitration.

In this case, the Union advised the Company that it would be proceeding to arbitration upon conclusion of the Board of Adjustment, and we believe that that is sufficient compliance with the Agreement.

The Union contends that there is no merit to the discharge of the Grievant. We need only to look at the shifting reasons given by the Employer for his termination. Tim Southwick, the owner, testified that the only reason the Grievant was discharged was his failure to follow the tracking system; Mike Levy, the Grievant's supervisor, testified however that the Grievant followed the tracking system after it was brought to his attention, and that it was not the tracking system which was the reason for the discharge, but rather, the Grievant's "ineffectiveness." Mr. Levy concluded that the Grievant was not completing enough sales based on the customers he was contacting. On the other hand, Floyd LaMarr used the term "productivity" when discussing the matter with the Union. When the Grievant was terminated, he was told that the only reason was for "lack of production."

Clearly, the tracking procedure issue cannot be grounds for discharge. First, Mr. Levy testified that the Grievant began to follow it after he brought it to his attention. Second, other salespersons failed to follow it, and finally, nothing was mentioned to the Grievant about the other salesperson' failure to follow the tracking system until November 15, 1982, several months after his hire, even though Mr. Southwick was privy to this information.

With respect to the issue of lack of productivity, the Grievant had never been warned, nor had anything about his productivity been mentioned to him, prior to his discharge. However, he consistently met the Company's standard of meeting his draw by mid-month, and the sales records for the month of November indicate that the Grievant was clearly doing better than other salespersons who were not terminated. There can be no legitimate

justification for discharge when the Grievant's sales commission records reveal substantially better sales than the two other used car sales personnel, and better than some of the new car salespeople.

The Union believes that the Employer has not established any reason whatsoever for discharging the Grievant. Although we may not have established any Union animus on the record, that can be the only explanation of the discharge in light of this Employer's repeated history of problems with this and other unions.

In an arbitration heard by Gerald R. McKay in August and November 1983, *S&K Toyota and Automobile Salesman's Union Local No. 1095,* the arbitrator dealt with the question of discharge provisions in salespersons' contracts. Arbitrator McKay ruled that the language of a similar contract created a just cause standard with respect to sales personnel. The Union submits that this decision interprets the language which has historicaly been in contracts in this industry to require the Employer to justify the discharge of a salesperson. In this case, Berkeley Toyota has not met that burden.

The Union requests that the grievance be granted and that the Grievant be reinstated with full back pay.

Conclusions

Turning first to the arbitrability issue, the Company's argument is quite correct, as far as it goes. The provisions of 17-5 are clear, and require that a matter properly referred to arbitration must be reduced to writing, must cite specific provisions of the Agreement allegedly violated, must specify the relief sought, and, most significantly, must be served upon the Employer within 30 calendar days from the date the incident giving rise to the grievance is alleged to have first occurred. These provisions have not been met in the present dispute, and in particular the 30-day provision has not been complied with.

The difficulty with the Company's position, as indicated in the Arbitrator's "timeliness" summary set forth above, and as argued in the Union's brief, is that the Company itself has acted in a manner to induce the Union to believe that the Company did not

intend strictly to adhere to the time requirements of the Agreement. When delays and exceptions are initiated by the Company's own actions it may not subsequently rely upon strictly stated provisions of the Agreement to undercut what appeared to have been an ongoing attempt to resolve the dispute. The doctrine of estoppel may be properly asserted and applied in this situation. If the employer wishes to avail itself of the strictly stated provisions of the Agreement, it is obliged to act in a manner which makes that position clear.

Turning to the substantive issue, the Union's assertion that something akin to a "just cause" requirement may be found in the Agreement is not supported by the language of the Agreement, or by the *S&K Toyota and Automobile Salesmen's Union Local No. 1095* case cited by the Union. In regard to the citation, it is sufficient to note the arbitrator's observation at the end of his award that, "the fact that the employees have a right not to be discriminated against, does not raise [the relevant contract provisions] to just cause provisions." There the arbitrator concluded that a finding that the grievant had sold fewer automobiles than the employer considered to be an acceptable standard was sufficient grounds for termination, and the termination was upheld.

The Union observes correctly in the present dispute that different and contradictory reasons were given by different Company witnesses as to the reason for the termination of the Grievant. Levy testified that the Grievant was discharged for lack of productivity, while Soutwick stated flatly that it was only for failure to follow the "tracking" procedure.

Nor is Levy's testimony concerning the November meetings between him and the Grievant inherently very probable. The first meeting was supposed to have produced an improvement in the Grievant's performance, yet it was only a week later that his performance had once again demonstrated "ineffectiveness magnified." How improvement and magnified ineffectiveness could occur within one week is not clear.

At the arbitration hearing Levy stated that had "no idea" of what the Grievant's sales record had been compared with others, although he believed he would have known at the time the

Grievant was discharged. As to following the required procedures, Levy admitted at one point that there are "different levels of cooperation" among different salesmen concerning the tracking system, and when asked whether all salesmen followed the program religiously, he even replied, "Of course not."

The Agreement between the parties is quite broad in granting the Employer the right, subject to qualifications not relevant to this dispute, to replace employees for "the efficient operation" of the business. And, as the Grievant himself observed when Levy resumed his job as sales manager with the Company, he had a right to bring his "own crew" on board if he wished, according to industry practice. The contradictions and inconsistencies in the Company's testimony, however, make it difficult for the Company to rely upon these provisions in the present dispute.

So far as Levy having his "own crew" is concerned, he appears to have declined the Grievant's offer to resign at the time he took over. What we are faced with, then, is not a turnover situation (whatever contractual implications that situation might have), but a situation where an ongoing employee of the Company has been terminated. Although we have observed that Arbitrator McKay, in *S&K Toyota*, did not find a "just cause" provision in similar contractual language, he did deal with language allowing the Employer to discharge or replace employees for the "efficient and/or effective operation" of the dealership. That language is similar to the "efficient operation of his business" provision of Section 4-3 of the present Agreement. The language in *S&K Toyota* also provided "sole authority" in the employer to terminate employees for "substandard performance", a provision which does not appear in the present Agreement. The similarities of language are, however, sufficient to warrant an examination of the principle set forth by Arbitrator McKay in the *S&K Toyota* case.

The arbitrator there recognized, and I agree, that any restrictions on the right of the employer to terminate employees under the typical contract in the automobile sales industry are considerably less rigorous than would be the case under a standard "just cause" concept. What Arbitrator McKay clearly does say, nevertheless, is that there are inherently *some* restrictions on the employer's ability to terminate an employee, even if those restric-

tions are relatively minimal. In the *Toyota* case the arbitrator based his determination on an examination as to whether or not the employer had shown the grievant therein to have exhibited substandard performance. Specific figures were cited, and the evidence clearly demonstrated that that employee had been substandard. Arbitrator McKay based his award on that finding.

In the present dispute, by contrast, the Company's contention that the Grievant was guilty of substandard performance is not pursuasive. No other ground for his termination has been advanced. In fact, the evidence supports the Union's assertion that the Employer "has not established any reason whatsoever" for discharging the Grievant.

While it is true that the original charge of discrimination on the basis of Union activity is also not supported by the evidence, and while to all intents and purposes that charge has been abandoned by the Union, it must be concluded that the principles advanced in the McKay award apply. That is, if the Company is going to rely upon alleged substandard performance to support a termination, it has the obligation of proving such performance. In brief, the Employer has failed to show that the termination of this Grievant was "for the efficient operation of his business", as alleged. The Employer has failed to establish either a generally accepted level of performance, or to show that the Grievant's behavior fell short of that standard.

The Award is rendered accordingly.

AWARD

Grievant Floyd Johnson was discharged in violation of the Agreement between the parties. He shall therefore be reinstated with full back pay.

The Arbitrator retains jurisdiction for a period of 90 days in the event that any dispute should arise as to the interpretation of the Award, or as to the amount of back pay due.

/s/ WILLIAM EATON
William Eaton
Artbitrator

May 25, 1984

No. 86-923

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

TOYOTA OF BERKELEY,
Petitioner,

v.

AUTOMOBILE SALESMEN'S UNION, LOCAL 1095,
UNITED FOOD AND COMMERCIAL WORKERS UNION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

DAVID A. ROSENFELD
(Counsel of Record)
VAN BOURG, WEINBERG,
ROGER & ROSENFELD
875 Battery Street
San Francisco, CA 94111
(415) 864-4000
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-923

TOYOTA OF BERKELEY,

Petitioner,

v.

AUTOMOBILE SALESMEN'S UNION, LOCAL 1095, UNITED FOOD AND COMMERCIAL WORKERS UNION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

The citations to the decisions below, the basis of this Court's jurisdiction and the relevant statutory provisions are set out in pages 1 and 2 of the Petition for a Writ of Certiorari filed by petitioner and are therefore not repeated here. The statement of the case submitted by the petitioner generally states the procedural history of this case and only a few additional words are necessary.

STATEMENT OF THE CASE

In addition to the statements made in the Petition, it is important to note the following two facts: (1) the employer voluntarily submitted the question of "arbitrability" arising from the procedural question of the timeliness of the Union's demand for arbitration to the arbitrator; (2) the arbitrator, although noting the clear language of the contract, held that the employer was estopped from asserting the language in light of its conduct which lead the Union to believe that the language would not be strictly enforced. More precisely, the arbitrator noted that at the same time the grievance involved in this matter was being processed, the Union demanded on a timely basis arbitration of another grievance. (Appendix, page 22.) When the Union demanded arbitration of that grievance, as the arbitrator noted, "the Employer responded by stating that the 'request for arbitration is premature' ". (*Id.*) Thus, the arbitrator found that because of the employer's conduct, it was estopped from asserting the clear language of the contract.

REASONS FOR DENYING THE WRIT

The issue in this case concerns solely the question of whether an arbitrator should decide procedural questions arising out of a party's compliance with a grievance procedure. There are two compelling reasons why this writ should not be granted.

First, the employer voluntarily submitted to the arbitrator the question of the Union's compliance with the grievance procedure. Although this Court has not squarely addressed that question, the Ninth Circuit has held that where issues of arbitrability are voluntarily submitted to an arbitrator, the parties cannot be heard to later complain that the arbitrator should not have decided the "arbitrability" question. See *George Day Construction v. United Brotherhood of Carpenters*, 722 F.2d

1471, 1474-75 (9th Cir. 1984). This is not a case where the employer refused to arbitrate, and the court compelled the parties to resolve the questions of arbitrability. *A.T.&T. Technologies v. Communications Workers*, —— U.S. ——, 89 L.Ed. 2d 648 (1986).

There is a second compelling reason why this writ should be denied. When this Court decided *A.T.&T. Technologies v. Communication Workers* it did not disturb any settled principles of law. Indeed, since *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), procedural issues arising out of the interpretation of the agreement must be resolved by the arbitrator:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* at 557.

Since that decision, contrary to the suggestion of the petitioner, the courts have routinely compelled the parties to resolve such procedural issues as have arisen in this case, including the claim of the employer that the Union failed to comply with the time limits of the contract. Indeed, the position advanced by petitioner is so frivolous that the District of Columbia Circuit Court of Appeals approved the granting of fees to a Union where the employer had resisted arbitration on precisely the same ground. *Washington Hospital Center v. Service Employees Local 722*, 746 F.2d 1503, 1508-1509 (D.C. Cir. 1984). Nor is this case any different from *Shopmens Local 539 v. Mosher Steel Company*, 796 F.2d 1361 (11th Cir. 1986) in which a court confirmed an arbitration award in which an arbitrator had determined that the employer had waived its right to insist upon strict compliance with grievance procedure time limits. See also *Beer, Soft Drink Workers v. Metropolitan Distributors, Inc.*, 763 F.2d 300 (7th Cir. 1985). Thus, the Ninth Circuit properly relied upon its prior authority of *Retail*

Delivery Drivers Local 488 v. Servomation Corp., 717 F.2d 475, 477-78 (9th Cir. 1983) (Appendix, p.2.)

This case involves circumstances where the Union admittedly failed to comply with the time limits but did so because the employer had expressly refused to accept the Union's demand for arbitration of a similar grievance filed at the same time on the ground that the demand for arbitration was "premature". Based on this, the arbitrator determined that the employer was estopped from asserting the strict time limits. And this Court has held that such equitable issues as laches are to be decided by an arbitrator. *International Union of Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487 (1972). We think the arbitrator was well within his jurisdiction of holding the employer to the doctrine of estoppel. Thus, petitioner's reliance upon *Detroit Coil Co. v. I.A.M. Lodge 82*, 594 F.2d 575 (6th Cir. 1979), cert. denied, 440 U.S. 840 (1979) is misplaced. In that case the Union did not make an argument that the employer was estopped or had somehow waived compliance with the clear language of the contract.

In summary, the petitioner voluntarily submitted to arbitration the question whether the Union's efforts substantially complied with the grievance procedure and whether the employer was estopped from asserting that any failure to strictly comply with the procedure barred arbitration. The petitioner's suggestion that this case ought to be heard by this Court rests upon an assertion that *A.T.&T. Technologies* substantially undermined more than twenty (20) years of history since this court decided *John Wiley & Sons v. Livingston*. The lower courts have had no trouble in remanding questions of procedural arbitrability to arbitration and *A.T.&T. Technologies* does not disturb that judicial history.

CONCLUSION

For the reasons suggested above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAVID A. ROSENFELD
(Counsel of Record)
VAN BOURG, WEINBERG,
ROGER & ROSENFELD
875 Battery Street
San Francisco, CA 94111
(415) 864-4000
Counsel for Respondent

March 9, 1987